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In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT B. SUTTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the district court's refusal to suppress documents that were subpoenaed by the grand jury and were later disclosed to the Department of Energy, on the ground that the documents had become "part of the public record" by virtue of their use at petitioner Sutton's criminal trial.

2. Whether Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, authorized the government to sue petitioners for restitution of the profits they realized by violating the crude oil certification regulations.

3. Whether petitioner Sutton was properly held personally liable for restitution of profits realized by his corporations as a result of his miscertifications.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A48) is reported at 795 F.2d 1040. The opinion of the district court is unofficially reported at [1981-1984 Transfer Binder] Energy Mgmt. (CCH) ¶ 26,501.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1986. The petition for a writ of certiorari was filed as of July 11, 1986, on August 28, 1986. The jurisdiction of this Court is invoked under Section 5(a)(1) of the Emergency Petroleum Allocation

[1] We have lodged ten copies of the district court's opinion with the Clerk.

Act of 1973, 15 U.S.C. 754(a)(1), which incorporates by reference Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note.

STATEMENT

1. Following the OPEC oil embargo of 1973, Congress passed the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.*, to ensure a fair allocation of available petroleum supplies at "equitable prices" (EPAA § 4(b)(1)(F), 15 U.S.C. 753(b)(1)(F)). In December of that year, the Department of Energy (DOE)[2] promulgated price control regulations for all sectors of the petroleum industry pursuant to the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note. 6 C.F.R. Pt. 150 (1974), 38 Fed. Reg. 22536 (1973); see also 10 C.F.R. Pt. 212 (1975), 39 Fed. Reg. 1924 (1974) (regulations as repromulgated under EPAA). These price controls instituted a multi-tier pricing mechanism designed to slow the rise of crude oil prices without eliminating incentives to increase domestic production. See *United States* v. *Exxon Corp.*, 773 F.2d 1240, 1248 (Temp. Emer. Ct. App. 1985), cert. denied, No. 85-429 (Jan. 27, 1986).[3]

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[2] We use the term DOE to refer to the current and predecessor agencies. The various agencies are set forth in *Pennzoil* v. *DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).

[3] The price controls applicable to this case remained in effect until January 28, 1981, when they were lifted by Executive Order. Exec. Order No. 12,287, 46 Fed. Reg. 9909. The EPAA expired on September 30, 1981, although enforcement actions like this one continue under a savings clause. 15 U.S.C. 767; see also 1 U.S.C. 109.

The regulatory scheme established a complex petroleum pricing structure involving two categories or "tiers" of price-controlled domestic crude oil and a third tier consisting of market-priced oil. In general, "old oil," *i.e.*, oil being produced from old sources in volumes less than historic production levels, could be sold at specified "lower tier" prices. By contrast, "new oil," *i.e.*, oil produced from new sources or from old sources in excess of historic production levels, could be sold at higher "upper tier" prices. The third, and highest priced, tier of crude oil, known as "market-priced" oil, generally consisted of oil from low production "stripper" wells and foreign oil, which could be sold at market prices. 10 C.F.R. 212.54(c), 212.72-212.76 (1978), 41 Fed. Reg. 4931 (1976); 41 Fed. Reg. 48319 (1976); *Exxon Corp.* v. *DOE*, 802 F.2d 1400, 1401 (Temp. Emer. Ct. App. 1986).

This pricing system gave refiners with access to low cost, price-controlled oil a substantial competitive advantage over their competitors. To remedy this problem, DOE adopted the Old Oil Allocation ("entitlements") Program in November 1974. 10 C.F.R. 211.67 (1975), 39 Fed. Reg. 42246. Under this program, each refiner had an "entitlement" to refine a proportionate number of barrels of old oil each month. Rather than reallocate the physical barrels of crude oil, however, the program required refiners with superior access to lower-priced old oil to make cash payments to refiners with relatively less access to old oil. In this way, the regulations "spread the benefit of access to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products" (*Cities Service Co.* v. *FEA*, 529 F.2d 1016,

1021 (Temp. Emer. Ct. App. 1975), cert. denied, 426 U.S. 947 (1976); *Exxon Corp.* v. *DOE*, 802 F.2d at 1401-1402.[4]

The ability to trace the correct amount of lower-tier crude oil to refiners was crucial to the effective operation of the entitlements program, because the amount of each refiner's cash payment or receipt under the program was dependent on its proportional access to lower tier oil. If lower-tier crude oil were miscertified and sold at higher prices as uncontrolled oil, refiners in the aggregate would have a higher average cost of crude oil. Under the regulations (10 C.F.R. 212.83 (1978)), these higher costs could be passed on by refiners to their customers and would ultimately be passed on to consumers. 15 U.S.C. 753(b)(2)(A); *United States* v. *Exxon Corp.*, 773 F.2d at 1284-1285; *Cities Service Co.* v. *FEA*, 529 F.2d at 1021; see R. 26127-26128.

To ensure that the entitlements program operated properly, DOE required each seller of domestic crude oil to certify in writing to the purchaser the respective volumes of and respective per barrel prices for the old crude oil, new crude oil, and stripper well crude oil (10 C.F.R. 212.131 (1978), 39 Fed. Reg. 31622 (1974)).[5] Moreover, all regulated firms were

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[4] The entitlements program is described in greater detail in the decisions upholding the validity of the program. See *Cities Service* v. *FEA, supra; Pasco, Inc.* v. *FEA*, 525 F.2d 1391 (Temp. Emer. Ct. App. 1975).

[5] Section 212.131(c) made it unlawful to sell crude oil without providing the required certifications. 39 Fed. Reg. 42246 (1974). Section 212.131(d) further provided that "[a]ll [required] certifications * * * shall be in writing, either upon an invoice or billing or by separate instrument, and shall be effective only when delivered to and received by the purchaser of domestic crude oil." 40 Fed. Reg. 28446 (1975).

required to maintain records to justify their prices and to provide the agency with access to their records when requested. *E.g.*, 10 C.F.R. 210.92(a) and (b) (1975), 39 Fed. Reg. 1924 (1974). Crude oil resellers were also required to file monthly reports to facilitate DOE's oversight of the regulatory scheme. 15 U.S.C. 772(c); 10 C.F.R. 212.187(b) (1978); see 10 C.F.R. 212.126(b), 212.128(b) (1978).

2. a. Petitioner Robert Sutton is the president and sole shareholder of Sutton Investments Inc., and its wholly owned subsidiaries, BPM, Ltd., Scurry Oil Company, and Sooner Refining Company, all of which were crude oil resellers.[6] Prior to October 1981, a grand jury conducted an investigation of petitioners' price-certification practices during which it subpoenaed from third parties a large number of documents reflecting transactions with petitioners. In October 1981, Robert Sutton, BPM, Ltd., and Scurry Oil Company were indicted for fraudulently miscertifying approximately 240 million barrels of crude oil. The defendants were also charged with obstruction of justice for destroying records subpoenaed by DOE,[7] and with conspiring to obstruct justice by attempting to prevent a witness from testifying. Pet. App. A5. At

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[6] A "reseller" was defined as a "firm (other than a refiner or retailer) or that part of such a firm which carries on the trade or business of purchasing covered products [including crude oil], and reselling them without substantially changing their form to purchasers other than ultimate consumers" (10 C.F.R. 212.31 (1979)).

[7] The obstruction of justice count stemmed from petitioner Sutton's destruction of most of the materials sought by a DOE administrative subpoena in the sumer of 1978. The facts regarding this incident are summarized by the court of appeals at Pet. App. A6 & n.3.

petitioner Sutton's first criminal trial, some documents subpoenaed by the grand jury were received in evidence as exhibits (*id.* at A6-A7, A11). Additional documents were used to reconstruct records that petitioner Sutton had destroyed, and to prepare summaries of the information that should have been shown on such records. The summaries were introduced at trial under Fed. R. Evid. 1006 (GXs 80, 81); the underlying documents were not admitted, but they were disclosed to the defendants, were present in the courtroom during trial, and were referred to during defense cross-examination (Pet. App. A11, A14; R. 23416-23419). Separate juries found petitioner Sutton guilty of obstruction of justice and conspiracy to obstruct justice; he was acquitted on the miscertification charges (*ibid.*). See *United States* v. *Sutton*, 732 F.2d 1483 (10th Cir. 1984), cert. denied, 469 U.S. 1157 (1985).

b. DOE conducted an extensive audit of petitioners' crude oil resale transactions for the period of May 1976 through January 1981.[8] However, since petitioners had generally failed to maintain adequate records; and since, as the jury found when it convicted Sutton, many records originally created were destroyed at his direction; and since petitioners had filed none of the reports required by DOE regulations, DOE's auditors were forced to reconstruct petitioners' transactions by using documents obtained directly or indirectly from other firms that did business with petitioners. These documents were of three kinds: (1) pipeline company records obtained by DOE as part of its normal audit functions; (2) rec-

[8] DOE halted the inquiry once the grand jury began its investigation and did not resume its inquiry until after petitioner Sutton had been convicted.

ords of other third parties' transactions with petitioners, obtained in DOE's audits of those third parties; and (3) contracts and invoices that were admitted into evidence at petitioner Sutton's first criminal trial or that were the basis for the two summary exhibits of petitioners' transactions admitted into evidence under Fed. R. Evid. 1006 in Sutton's first criminal trial.

DOE obtained the documents in category (3) from the United States's Attorney's Office in May 1982, after Sutton's conviction. DOE asked the United States Attorney for the records of Sutton's crude oil resales that had been obtained by the grand jury, and the United States Attorney complied with this request, relying on a recent decision (by the judge who presided at the Sutton trial) that pre-existing documents, not prepared for the grand jury, are not "grand jury materials" within the meaning of Fed. R. Crim. P. 6(e) (see *In re Special Grand Jury*, Misc. No. 522 (N.D. Okla. Oct. 8, 1981)).[9] As additional precautions, the United States Attorney notified the district judge who had supervised the grand jury that DOE personnel would be given access to these documents (Pet. App. A7-A11; R. 23417-23418), and after the fact, in October 1982, the United States Attorney obtained a formal order of the district court authorizing the disclosure (Pet. App. A8; *In re Grand Jury Proceeding*, Misc. No. M-016 (N.D. Okla. Oct. 5, 1982)).

3. On November 9, 1982, the United States filed a civil action for restitution against petitioners in the United States District Court for the Northern District of Oklahoma under Section 209 of the ESA,

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[9] No grand jury testimony was sought or disclosed.

12 U.S.C. (1976 ed.) 1904 note.[10] The government alleged that petitioners had violated the price regulations by miscertifying approximately 177 million barrels of crude oil, resulting in unlawful profits in excess of $700 million.[11]

Before trial, petitioners moved to suppress the business records that DOE had obtained from the United States Attorney's Office, on the ground that the records had been disclosed in violation of Fed. R. Crim. P. 6(e). The district court ruled that approximately 98% of the documents were not subject to Rule 6(e) because they were part of the public record: some of these documents had been admitted into evidence at Sutton's first criminal trial; the remainder had been the basis for the summary exhibits admitted under Fed. R. Evid. 1006, had been present in the courtroom, and had been the subject of extensive cross-examination (Pet. App. A10-A14; R. 24256-24257).[12]

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[10] The government initially sought civil penalties against petitioners under Section 208(a) of the Act as well as restitution, but the government abandoned its claim for civil penalties before trial (Pet. App. A2 n.1).

[11] The audit revealed that the petitioners had violated the certication regulations in two ways. First, petitioners resold price-controlled oil without any certification. Second, and more often, petitioners miscertified lower tier oil as higher-priced upper tier oil or as market-priced oil (R. 26123-26124).

[12] The court concluded, however, that the remaining 2% of the documents, which had not become part of the public record, were subject to Rule 6(e) (R. 24258). The court noted that the government obtained these documents in good faith reliance on the 1981 district court ruling that pre-existing

After a seven-week trial, the district court found that petitioners had committed the alleged miscertifications and entered judgment in favor of the United States against all defendants jointly and severally in the amount of approximately $210 million in restitution and $212 million in interest (R. 26113-26150; see Pet. App. A3). The court ruled that petitioner Sutton was personally liable to make restitution because the corporate defendants were his alter egos and he had personally directed the violations (Pet. App. A3). The court directed that the amount awarded be paid to the government for distribution to the states for use in energy related programs (*ibid.*; R. 26124-26126).

4. The court of appeals affirmed (Pet. App. 1a-48a). The court rejected petitioners' claim that the documents obtained by DOE that had been used at petitioner Sutton's criminal trial should be suppressed (*id.* at A7-A14). The court concluded that the documents were not protected by Rule 6(e) when DOE obtained them, because they were "part of the public record" as the result of events at that trial (Pet. App. A14). The court of appeals upheld the district court's finding that some of the documents had been admitted into evidence; it ruled that the remainder constituted "records of [criminal] judicial proceedings," which the public has "the right to inspect and copy," be-

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documents are not grand jury materials (R. 24259), but the court ultimately excluded these documents (R. 26127, 26144).

The district court also rejected petitioner's claims that this suit was barred by the state statute of limitations (R. 23446); that petitioner Sutton's acquittal on several counts in his first criminal trial collaterally estopped the government from bringing this civil suit for restitution (R. 23412); and that petitioners were entitled to a jury tral (R. 25344A).

cause, while not formally admitted into evidence, the documents were "the real evidence presented in the case," "the documents * * * had been turned over to defendants during discovery in the criminal case, the documents were present in the courtroom throughout the criminal trial, and they were in fact the subject of extensive cross-examination during the criminal trial" (*ibid.*).

The court also rejected petitioner's argument that the remedy awarded in this action was a civil penalty, not restitution (Pet. App. A37). Relying on its earlier decision in *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982), the court ruled that Section 209 of the ESA, 12 U.S.C. (1976 ed.) 1904 note, authorized the government to seek restitution from petitioners of the profits they obtained by violating the oil price controls regardless of whether anyone was injured (Pet. App. A37). The court of appeals then held that, because this was an action for restitution, the district court had correctly ruled that petitioners were not entitled to a jury trial (*ibid.*).

Finally, the court upheld the remedy chosen by the district court, *i.e.*, requiring that the award be disbursed to state governments for use in energy related programs (Pet. App. A41-A43). The court recognized that the overcharges caused by petitioners' miscertifications were passed "through the chain of commerce to the ultimate consumers" with "the result being that the ultimate loser was the petroleum products consuming public" (*id.* at A42). Accordingly, relying on *United States* v. *Exxon Corp.*, 773 F.2d 1240, 1283-1287 (Temp. Emer. Ct. App. 1985), cert. denied, No. 85-429 (Jan. 27, 1986), the court of appeals held that the district court's remedy was not an abuse of its discretion (Pet. App. A42-A43).

ARGUMENT

1. Petitioners argue (Pet. 10-18) that the district court should have suppressed certain documents that DOE obtained from the grand jury that indicted petitioner Sutton. The district court and court of appeals rejected this argument on the ground that the documents in question were, in fact, matters of public record: the government used these documents in Sutton's criminal prosecution as the basis for two summary exhibits that were introduced at trial under Fed. R. Evid. 1006, and the documents were physically present in the courtroom and were the subject of extensive cross-examination. The ruling that these documents had under these circumstances become matters of public record was correct, does not conflict with any decision of this Court or another court of appeals, and does not warrant review by this Court.[13]

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[13] We also believe that the documents involved here were not "grand jury materials" within the meaning of Fed. R. Crim. P. 6(e) and that the district court's decision to admit these documents into evidence at the trial in this case was correct for that reason as well. All of these documents, without exception, are corporate business records that existed before the grand jury began its investigation. Several courts of appeals have ruled that documents of this kind, created for reasons independent of the grand jury, do not ordinarily constitute "matters occurring before the grand jury" within the meaning of Rule 6(e), because the disclosure of such documents would not reveal the nature of the grand jury's inquiry or threaten its deliberative process. *E.g., SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1382-1383 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); *In re Grand Jury Investigation (SCI)*, 630 F.2d 996, 1000 (3d Cir. 1980), cert. denied, 449 U.S. 1081 (1981); *United States* v. *Stanford*, 589 F.2d 285, 291 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States* v. *Weinstein*, 511 F.2d 622, 627 n.5 (2d Cir.), cert. denied, 422 U.S. 1042 (1975); *United States* v. *Interstate Dress*

The public has a common law right to inspect the judicial records of criminal or civil proceedings. *E.g.*, *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597-599 (1978); *United States* v. *Criden*, 648 F.2d 814, 823 (3d Cir. 1981); *In re National Broadcasting Co.*, 635 F.2d 945, 949-953 (2d Cir. 1980). The documents that were formally admitted into evidence at petitioner Sutton's trial were clearly judicial records no longer protected by Rule 6(e). *United States* v. *Manglitz*, 773 F.2d 1463, 1467-1468 (4th Cir. 1985); cf. *LaMorte* v. *Mansfield*, 438 F.2d 448 (2d Cir. 1971) (secrecy of testimony given pursuant to an SEC subpoena was waived when an unrestricted disclosure of the testimony occurred). Here, the court of appeals ruled that the documents on which summary Exhibits 80 and 81 were based had also, under the circumstances, become matters of public record: the documents were disclosed to defense counsel, they were present in the courtroom during the trial, and

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Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960). Some courts have ruled that pre-existing documents are covered by Rule 6(e) under circumstances where their disclosure could reveal the workings of the grand jury. See, *e.g.*, *In re Grand Jury Matter (Garden Court Nursing Home)*, 697 F.2d 511, 512-513 (3d Cir. 1983). No such circumstances were present in this case, however. To the contrary, petitioner Sutton had already been publicly tried for the miscertifications underlying this suit.

The district court and the court of appeals concluded that the pre-existing documents here were grand jury materials within the meaning of Rule 6(e) (Pet. App. A15). Both courts asserted that *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), ruled that any document subpoenaed by the grand jury is a "matter[] occurring before the grand jury" under Rule 6(e). We believe the courts below erred in their reading of *Sells*. The question of the status of pre-existing documents was not presented in *Sells*, and the Court had no occasion to discuss the issue.

they were used on defense cross-examination (R. 24256-24257);[14] these documents were, as the court of appeals said, "the real evidence," and the fact that they were not formally admitted was a matter of convenience, not affecting the public's right to inspect them.

Treatment of these documents as judicial records, available to the public, is consistent with other decisions interpreting the judicial records doctrine. The doctrine enables the public to observe and comment on matters of public importance, including the operation of the judicial system. *E.g.*, *United States* v. *Smith*, 776 F.2d 1104, 1110 (3d Cir. 1985); *Criden*, 648 F.2d at 821-823; see *Nixon* v. *Warner Communications, Inc.*, 435 U.S. at 597-598. Accordingly, the courts have applied the doctrine to a variety of documents other than evidence formally admitted at trial. See, *e.g.*, *United States* v. *Smith*, *supra* (bill of particulars); *CBS, Inc.* v. *United States District Court*, 765 F.2d 823, 825 (9th Cir. 1985) (defendant's motion for a reduction of his sentence under Fed. R. Crim. P. 35); *Newman* v. *Graddick*, 696 F.2d 796, 803-804 (11th Cir. 1983) (lists of prisoners submitted during the monitoring stage of a suit challenging prison conditions). Rule 1006, Fed. R. Evid., allows a party to avoid the burden and inconvenience

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[14] During petitioner Sutton's first criminal trial, the defense cross-examined FBI Agent David Breckwald extensively regarding his invoice-by-invoice summary of the records obtained from third parties for the same period of time (R. 22583-22605). In addition, the defense cross-examined Agent Breckwald regarding the entire production of certain companies (*e.g.*, R. 22590-22600) and regarding issues not in the summaries, such as the price on particular invoices and the profit margin (Cr. Tr. 2355-2400).

of introducing voluminous documents to prove a fact in issue by introducing a summary of their contents, so long as the originals are made available for examination or copying by the other parties and subject to the court's right to order that the originals be produced in court. In this case, the documents were made available for inspection and copying, were produced in court, and were the subject of extensive cross-examination. The court of appeals' ruling that at that point they were part of the public record was plainly correct.[15]

No purpose of Rule 6(e) would be served by a distinction between summary exhibits formally admitted into evidence (which clearly lose their confidential character) and underlying materials that are "the real evidence in the case." Rule 1006 is a rule of convenience, and neither the parties nor the public should be prejudiced by the use for convenience of a summary rather than documents that would clearly have been admissible themselves. Of course, a criminal defendant may, in a particular case, have the right to have a document or set of documents, or the part of a summary exhibit that summarizes them, kept under seal. But petitioner Sutton made no claim at his criminal trial that any of the documents in question should not be allowed to become matters of public record.

Finally, suppression would have been an altogether inappropriate remedy in this case. On the one hand,

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[15] Petitioners err in contending (Pet. 10) that the decision below conflicts with *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), and *Texas* v. *United States Steel Corp.*, 546 F.2d 626 (5th Cir.), cert. denied, 434 U.S. 889 (1977). Neither case involved documents that had previously been used at trial in any fashion.

the district court twice (R. 23425, 24258) found that the government had acted in good faith in reliance on a recent, local district court ruling that documents of this type were not subject to Rule 6(e) (page 7, *supra*). On the other hand, petitioners have not alleged that they were prejudiced in any way by DOE's use of these documents. And suppressing the documents would have rewarded petitioners for their established violations of the recordkeeping requirements of the entitlements program and petitioner Sutton's proven attempt to destroy evidence. DOE was forced to rely on grand jury documents in order to audit petitioners' activities because they generally failed to maintain the necessary records and filed none of the required reports (Tr. 1344-1345, 1362-1364, 1468, 1476, 1587-1588, 2990-2992) and because a large number of their records were destroyed at petitioner Sutton's direction after petitioners received a DOE subpoena (Pet. App. A6-A7). Petitioners have failed to offer any reason why the government should be forced to bear the burden of suppression because of petitioners' efforts to evade detection.

2. Petitioners argue (Pet. 18-23) that they were entitled to a jury trial because the remedy awarded by the district court was a civil penalty, not restitution. The court's decision was consistent with past decisions and was correct. Further review is not warranted.[16]

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[16] There is no need to hold this case pending the decision in *Tull* v. *United States*, cert. granted, No. 85-1259 (May 27, 1986). The question there is whether the Seventh Amendment guarantees a right to a jury trial in an action brought by the government under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, seeking, inter alia, civil penalties. Because the court of appeals correctly ruled that the award in this case was one of restitution, not civil damages, the Court's decision in *Tull* will not affect the outcome of this case.

The court of appeals' characterization of the remedy as restitution is consistent with its decision upholding a similar award in *United States* v. *Exxon Corp.*, 773 F.2d 1240, 1286-1287 (Temp. Emer. Ct. App. 1985), cert. denied, No. 85-429 (Jan. 27, 1986), on the ground that the award was a proper exercise of a trial court's equitable authority. See also *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 722 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982). In both cases, TECA carefully considered the contention that an award of this type constitutes an award of a civil penalty and rejected that claim in well reasoned decisions. Section 209 of the ESA (12 U.S.C. (1976 ed.) 1904 note), quoted at Pet. App. A36 n.16, expressly authorizes the government to bring suit for restitution, and the restitutionary relief the government can obtain under ESA Section 209 is independent from and in addition to the civil penalties available under other sections of the ESA and the EPAA (*DOE* v. *West Texas Marketing Corp.*, 763 F.2d 1411, 1426 (Temp. Emer. Ct. App. 1985)).

Petitioners claim (Pet. 20) that the restitution award was improper because there is no statutory basis for seeking restitution for violations of the certification requirements. That claim lacks merit. Section 209 of the ESA authorized the district court to order restitution of benefits received in violation of any orders and regulations issued under the Act, which includes the certification regulation, 10 C.F.R. 212.131(c). As we have explained (pages 4-5, *supra*), the certification regulations were an essential part of the nationwide Entitlements Program. The district court's award was therefore authorized by the terms of the ESA.

Petitioners also claim that the restitution award was improper because the government did not prove that petitioners were unjustly enriched or that third parties were injured. That claim is completely without merit. The district court and the court of appeals both found that petitioners reaped enormous profits from miscertifying crude oil and that refiners and the public suffered increased costs from petitioners' misconduct (Pet. App. A31-A33, A40-A42). Moreover, the district court's award of restitution was proper even though the parties that received the award—the states—were not themselves injured. See *United States* v. *Exxon Corp.*, 773 F.2d at 1287 (upholding similar award to states); see also *Citronelle-Mobile Gathering, Inc.*, 669 F.2d at 722. As the court of appeals explained (Pet. App. A37), the purpose of a restitution award is to divest a wrongdoer of the amount by which he has been unjustly enriched. In addition, the award here—which the states were directed to use in energy-related programs—was a reasonable attempt to provide recompense to "the ultimate loser" from petitioners' scheme—"the petroleum products consuming public" (*id.* at A42)—given the "difficult, if not impossible" task (*ibid.*) of identifying the actual victims and calculating their actual losses.

Petitioners Seventh Amendment claim therefore lacks merit. It is well settled that restitution is an equitable remedy (*Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946); *Pierce* v. *Vision Investments, Inc.*, 779 F.2d 302, 308-309 (5th Cir. 1986) (disgorgement and restitution in vindication of a public right are "clearly equitable" in nature)), for which there is no right to a jury trial. *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90,

95 (2d Cir. 1978) (no right to jury trial in suit for restitution of profits resulting from violation of securities law); *Howard* v. *United States*, 214 F.2d 759, 762 (10th Cir. 1954) (no right to a jury trial for restitution of overcharges in violation of the Housing and Rent Act of 1947); see generally 5 J. Moore, J. Lucas, & J. Wicker, *Moore's Federal Practice* ¶ 38.24[2], at 38-196 (2d ed. 1986)).[17] Accordingly, the lower courts correctly rejected petitioners' claim that they were entitled to a jury trial.

3. Finally, petitioner Sutton argues (Pet. 22-23) that he should not be held personally liable for the miscertifications by his corporations. That claim also is without merit.

First, petitioner Sutton incorrectly asserts that the civil penalties provided by Section 5(a)(4) of the EPAA, 15 U.S.C. 754(a)(4), are the exclusive remedy for a knowing and willful violation of DOE regu-

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[17] Nothing in *Curtis* v. *Loether*, 415 U.S. 189 (1974), on which petitioners rely (Pet. 22), is to the contrary. In that case, the private plaintiff sought damages in an action for housing discrimination, and the Court emphasized that the award in fact constituted damages and could not be "viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff" (415 U.S. at 197). Moreover, the Court rejected the proposition that "any award of monetary relief must necessarily be 'legal' relief" (*id.* at 196). The *Curtis* case therefore does not support petitioner's claim.

Petitioner's reliance on *Camrex (Holdings) Ltd.* v. *Camrex Reliance Paint Co.*, 90 F.R.D. 313 (E.D.N.Y. 1981), is also misplaced. There, the court rejected the defendants' argument that they were entitled to a jury trial on " 'all issues involving claims for monetary relief' " (*id.* at 316), and denied a jury trial on a claim seeking rescission of a contract and restitution of the sums involved in plaintiff's performance (*id.* at 322). The court permitted a jury trial only on a contract claim (*id.* at 323).

lations by a corporate officer. The terms of Section 5(a)(4) do not make civil penalties the exclusive remedy, and, as the court of appeals explained (Pet. App. A33-A34), the legislative history of that provision makes clear that it offers an additional remedy, not the exclusive one.

Second, the courts below properly found Sutton personally and primarily liable because "these corporations were Sutton's alter egos and because Sutton personally engaged in tortious conduct" (Pet. App. A36). The court found that there was "overwhelming" and undisputed evidence of "nonpayment of dividends, failure of directors to play any meaningful role in managing the corporation[s], absence of any arm's length relationship between Sutton and his corporations, diversion of corporate funds for personal purposes, payment of personal expenses with corporation funds, use of corporate assets for personal purposes, payment of excessive compensation to Sutton and members of his family, the making of non-interest bearing loans to Sutton and his allied companies, and inadequate capitalization of, and intermingling of funds among, Sutton's various corporations, all at his direction" (*id.* at A34). The court also found that "virtually all of the profits generated by the corporate defendants were obtained through Sutton's illegal crude oil trading operations" (*ibid.*) and that "[t]he corporate defendants' creditors, including the United States, have been materially harmed by Sutton's appropriation of corporate funds to himself, his family, and his numerous personally-owned business ventures" (*id.* at A35). These findings amply support the imposition of personal liability.

Finally, the fact that petitioner Sutton was held personally liable to make restitution does not entitle

him to a jury trial. The government sought restitution from petitioner Sutton's corporations, and the district court held Sutton liable as the alter ego of those firms. Since the Seventh Amendment does not apply to suits for restitution, neither petitioner Sutton's corporations nor petitioner Sutton himself was entitled to a jury trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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